NO. 80-972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JAMES DANIEL OLDAG,
Petitioner

v.

CATHOLIC CHARITIES OF THE
DIOCESE OF GALVESTON-HOUSTON
and CYNTHIA TUTTLE,
Respondents

RESPONDENTS' BRIEF IN OPPOSITION ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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QUESTION PRESENTED FOR REVIEW

WHETHER THE "BEST INTEREST RULE" USED IN SECTION 13.21 OF THE TEXAS FAMILY CODE CAN BE CONSTITUTIONALLY APPLIED TO THE CLASS OF UNWED FATHERS WHEN ESTABLISHING THEIR STATUS AS "PARENTS" WHEN ALL MOTHERS AND MARRIED FATHERS ARE GIVEN STATUS AS A "PARENT" WITHOUT ANY APPLICATION OF THE "BEST INTEREST RULE", BECAUSE SUCH DISCRIMINATORY TREATMENT OF UNWED FATHERS VIOLATES THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION.

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To The Honorable Chief Justice and Associate Justices Of The Supreme Court of the United States:

Respondents, CATHOLIC CHARITIES OF THE DIOCESE OF GALVESTON-HOUTHON and CYNTHIA TUTTLE pray that the United States Supreme Court deny Petitioner's Application For Writ Of Certiorari field in this cause to review the judgment of the Supreme Court of Texas, entered in this case on July 16, 1980, and in which Petitioner's Motion For Rehearing Of Application For Writ Of Error was denied September 12, 1980.

OPINION BELOW

The opinion of the Supreme Court of Texas below is reported as *In the Interest Of T.E.T.*, 603 S.W.2d 793 (Tex. Sup. 1980). A copy of said opinion and order is attached to Petitioner's Application For Writ Of Certiorari filed herein, as Appendix "A", and for the purpose of brevity is not reprinted herein.

RESPONDENTS' JURISDICTIONAL STATEMENT

Respondents challenge the jurisdiction of this Court to consider Petitioner's Writ of Certiorari in that Petitioner did not attack the "Best Interest Rule" in the Court below and therefore the question now alleged was never properly presented below. The Petitioner in the Court below raised the question as to whether or not a showing of "unfitness" was required prior to either terminating his parental rights or in denying a voluntary legitimation case on the part of the unmarried father and this Honorable Court has previously answered the "unfitness" question in *Quilloin v. Walcott*, 434 U.S. 236, 98 S.Ct. 549, 54 L.Ed.2d 511.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Statutes involved in this case are selected provisions of Chapters 11, 12, and 13 of the Texas Family Code Annotated, which provisions are set forth verbatim in the Appendix of this Brief in Opposition.

RESPONDENTS' STATEMENT OF THE CASE

The child, the subject of this suit, was born March 10, 1977. Respondent, CATHOLIC CHARITIES, filed a suit to terminate the parent-child relationship on March 21, 1977, not March 2, 1977, as stated by Petitioner.

In a further effort to clear the record, CYNTHIA TUTTLE, the mother of the child was fourteen (14) years of age at the time of conception, not fifteen (15) as stated by Petitioner.

Contrary to the wholesome life style, Petitioner alleges his client led, Petitioner made several admissions at trial as to his life history. Petitioner admitted he was arrested on a rape charge which was filed before the child was born, (S.F. 384); that he had started drinking at the age of 15 or 16 (S.F. 388); that he had been picked up on a marijuana bust (S.F. 389); and that he had been charged with DWI when he was 17 (S.F. 390); and that he had been arrested for assault with a knife (S.F. 392).

The lawsuit proceeded to trial in December, 1977, and after hearing the evidence adduced at trial, the Court rendered judgment on the jury verdict.[1]

SUMMARY OF ARGUMENT

Respondents, CATHOLIC CHARITIES and CYNTHIA TUTTLE contend that the "best interest rule" as used in Section 13.21 of the Texas Family Code can be

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1. *In The Interest Of T.E.T.*, 583 S.W.2d 484 (Civ. App. Waco —1979). The two special issues which were submitted to the jury, and the jury's answers to the issues were as follows:

Special Issue No. 1: "Do you find from a preponderance of the evidence that it would be in the best interest of the child (T.E.T.), to terminate the parental rights of (Cynthia)".
Answer: "we do" or "we do not"
Answer: *we do*

Special Issue No. 2: "Do you find from a preponderance of the evidence that it is in the best interest of the child (T.E.T.) that this Court designate (James Oldag) her parent?"
Answer: "He should be designated her parent" or "He should not be designated her parent".
Answer: *He should not be designated her parent.*

The jury instructions are also set forth, *Id.* at 486. See also *Interest of T.E.T.*, 603 S.W.2d 793, at page 794.

constitutionally applied to the class of unwed fathers when establishing their status as parents even though all mothers and married fathers are given the status of a "parent", without application of the "best interest rule" and that the discriminatory treatment of unwed fathers, if any, is substantially related to the important state objective of promoting the best interest of children born out of wedlock and is substantially related to the achievement of that objective.

Respondents further argue that Petitioner failed to properly present his argument as it relates to the "Best Interest Rule" in the Court below.

ARGUMENT AND AUTHORITIES

Petitioner contends that Section 13.21 of the Texas Family Code as applied to unwed fathers violates their equal protection and due process rights as set forth in *Stanley v. Illinois*.[2] Respondents allege that JAMES DANIEL OLDAG has no constitutional complaint whatsoever in regard to *Stanley*. Petitioner was given notice and actively participated in all of the hearings which took place in this case. In fact, no where in the record is it reflected that Petitioner either executed or filed a proper statement of paternity.[3] The Courts in Texas are well aware as to what is guaranteed an unwed father by the *Stanley* decision.[4] Citing *Stanley*,[5] the Texas Supreme Court stated *In The Interest Of K*.[6]

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2. 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972).

3. Section 13.21 and 13.22, Tex. Fam. Code Ann.

4. *Id.*, note 2.

5. *Id.*

6. 535 S.W.2d 168 (Tex.) *cert. denied*, 429 U.S. 907, Reh. denied, 429 U.S. 1010 (1976).

> "Stanley does not decree that all unwed fathers have fundamental rights to parental rights or that every statutory discrimination against unwed fathers is suspect." *In The Interest Of K, supra* at 171.

Petitioner advances the argument that, since there is a "best interest" burden placed on unwed fathers under Chapter 13, Subchapter B of the Texas Family Code, (when the mother withholds consent to voluntary legitimation) and that no "best interest" burden[7] is placed on an unwilling biological father under Chapter 13, Subchapter A, it is discriminatory and violates a "willing" unwed father's due process and equal protection rights. The case of *Gomez v. Perez*[8] is cited by Petitioner as illustrative of this point. In *Gomez,* this Honorable Court held that unwed fathers as well as married fathers have a duty and obligation to support their offspring. Petitioner contends that since proof of paternity is all that is required under § 13.01, that is all that should be required under Section 13.21, and not the required proof of "best interest."

From Respondent's reading of the *Gomez* decision it is assumed to be a right of the child for support. *Gomez* does not appear to be a "mother's rights" case nor a "father's rights" case, but, if you will, a "children's rights" case. This Court pointed out in *Gomez*:

> ". . . A State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally."[9]

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7. Section 13.08(a), Tex. Fam. Code Ann. (this section requires proof of only biological parentage in involuntary paternity suits).

8. 409 U.S. 535, 35 L.Ed.2d 56, 93 S.Ct. 872 (1973).

9. *Id.*, 35 L.Ed.2d at page 60.

In addressing Petitioner's no "best interest" standard under Chapter 13, Subchapter A, Respondent would submit that "best interest" is implied in this Section. It can be suggested that prior to the mother or custodian of a child filing an involuntary paternity suit it must first be determined what effect or ramification there will be by designating a certain unwed father as a "parent". The child would, most probably, begin receiving child support, but the once unwilling father now becomes a parent, with all the rights and privileges of a parent.[10]

If any discrimination exists under Chapter 13, Subchapter A and B, such discrimination would have a chilling effect on the mother or custodian in that they might be very hesitant to pursue a *Gomez* case against certain unwed fathers (i.e. a rapist).

The unwed father of an illegitimate child obviously has consented to the sexual encounter that results in the conception of the child. If that unwed father decides to take on the responsibility of being a parent he should be required to step forward and show that the child will derive more than just a monetary benefit by his being designated as a parent. There would be no one better qualified to illustrate to a judge or jury the benefit a child would receive from such action than the child's biological father.

In the instant case, JAMES DANIEL OLDAG was afforded the opportunity and, in fact, did present whatever relevant evidence he saw fit to present.

Petitioner claims that the gender-based provisions in Section 13.21 forces an unequal and discriminatory treat-

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10. Section 12.04, Tex. Fam. Code Ann.

ment of all unwed fathers as contrasted to all women and married fathers and that Section 13.21 does not meet the constitutional requirements of the Equal Protection Clause and the Due Process clause of the 14th amendment of the U.S. Constitution. Petitioner argues that the "equal rights" and "due process" standards as stated by this Court in *Caban v. Mohammed*[11] must be applied.

Respondents, CATHOLIC CHARITIES and CYNTHIA TUTTLE submit that Section 13.21 of the Texas Family Code and Section 111 of the New York Domestic Relations Law[12] are distinguishable and that, even in light of *Caban*, 13.21 of the Texas Family Code does withstand constitutional attack.

The New York Statute which was struck down in *Caban*, neither provided for nor permitted the "best interest of the child" rule or standard. Such standard is provided in Section 13.21(c).[13] Absent the "best interest" standard (as with Section 111 of the New York Domestic Relations Law) a mother of an illegitimate child could arbitrarily withhold consent to the adoption, regardless of whether or not, such adoption was in the child's best interest. On the other hand, the unwed father of that same child had no such veto power over adoption. A statute

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11. 441 U.S. 380, 99 S.Ct. 1760, 60 L.Ed.2d 297 (1979).

12. "Subject to the limitations hereinafter set forth consent to adoption shall be required as follows:

"1. . . . .

"2. . . . .

"3. Of the mother, whether adult or infant, of a child born out of wedlock;

"4. . . . .

N.Y. DOM. REL. LAW § 111 (McKinney's 1977)

13. Even though the mother or Managing Conservator withholds consent, under 13.21(c) the Court can still designate an unwed father as a parent if such finding is in the best interest of the child.

such as the one struck down in *Caban* would and could work against that which would be in the best interest of the child.

As Respondents understand the *Caban* decision, the one and only threshold question as it related to the adoption of an illegitimate child, was the *consent of the mother,* to the complete exclusion of the unwed father. In Texas, the biological father is substantively and procedurally protected in that the threshold question is not the consent of the mother, but "what is in the best interest of the child"? Under the Texas scheme, even though a mother may withhold the consent to legitimate, the father may still urge, as was done by JAMES DANIEL OLDAG, and rely on the "best interest" standard to make his claim to the child.

In the *Caban* decision, it is noted that the father's legal rights might have been different under the New York Statute if the father had sought and obtained legal custody.[14]

In an effort to further distinguish the facts and the laws as presented in the case at bar and in *Caban,* Respondent would point out that Petitioner never maintained repeated contact, either with the child or with CATHOLIC CHARITIES. In fact, the record does not show, in any way, that Petitioner attempted to maintain any contact with the agency or the child. In *Caban,* the father had established a "family connection" with both the mother and the child. In the instant case, JAMES DANIEL OLDAG has made no effort or attempt whatsoever to provide any form of support for this child since birth. Petitioner states that Respondent's "collectively

14. *Caban v. Mohammed,* 60 L.Ed.2d at 304, fn. 6.

have taken every opportunity since the birth of the child to hinder the Petitioner from exercising any father-child relationship with his daughter" . . . (Petitioner's Writ of Certiorari, Page 23), although Petitioner fails to set forth the efforts, if any, he made in establishing this "father-child" relationship.

Respondents assert that Petitioner, even though admitting paternity, never manifested a significant paternal interest to the child.[15]

In *Quilloin v. Walcott,* 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978), this Court held that a natural father's substantive rights under the due process clause were not violated by the application of the "best interest of the child" standard. The trial court in *Quilloin,* supra, found, after hearing the evidence that it was not in the best interest of the child to grant the requested legitimation and this Honorable Court upheld the Georgia Trial Court's decision on "best interest" alone,[16] without a finding of unfitness as to the unwed father. The Court cites *Smith v. Org. of Foster Families,* 431 U.S. 816, 97 S.Ct. 2094, 2119, 53 L.Ed.2d 14 (1977).

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15. *Id.,* at page 308; this language implies that statutes such as Section 111 in this case "discriminates against unwed fathers . . . and they have manifested a significant parental interest in the child, but does not discriminate, or that the discrimination is justified, when *no* significant parental interest has been established.

16. *Quillion,* 98 S.Ct. at page 554:
". . . appellant contends that he was entitled to recognition and preservation of his paternal rights absent a showing of his "unfitness". Thus, the underlying issue is whether in circumstances of this case and in light of the authority granted by Georgia law to married fathers, appellants interest were adequately protected by a "best interest of the child" standard . . ."
". . . appellants substantive rights were not violated by application of a "best interest of the child standard".

> "We have little doubt that the Due Process Clause would be offended "if a State were to attempt to force a break up of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest". *Quilloin* at page 555.

Respondent again points out that the case at bar is not one which involves a "family unit" as it relates to JAMES DANIEL OLDAG and CYNTHIA TUTTLE.

Respondents, CATHOLIC CHARITIES and CYNTHIA TUTTLE would adopt the rationale as set out in *W.E.J. v. Superior Court of Los Angeles County,* 100 Cal. App. 3rd 303, 160 Cap. Rep. 862 (Cal. App. 1979), (Hearing denied by the California Supreme Court, 1980). In *W.E.J.* the Trial Court placed a child in the home of the biological unwed father merely because he had fathered the child. The Court of Appeals reversed and mandated the return of the child because such a finding was not in the child's best interest. The Court stated:

> "The extreme view that all unmarried fathers are to be accorded equal custody rights with the mother (and on par with married fathers) would have disastrous consequences for the child". *W.E.J.*, 160 Cal. Rep. at page 866.

The Court went on both to acknowledge and distinguish the *W.E.J.* case and *Caban*:

> "The Caban opinion must be read in the light of its factual situation . . . The Facts of the Caban case illustrated the injustice of that discrimination as applied to parents who had lived as a family for

> years . . . The protection of the child is well recognized as an important state interest". *W.E.J.*, 160 Cal. Rep. at page 869.

In response to Petitioner's statement that Respondents do not contend that the child is the member of anybody else's family (Petitioner's Writ of Certificate at page 24), Respondents would assert that she is a member of a family unit.

CYNTHIA TUTTLE, the child's mother released the child to the Respondent, CATHOLIC CHARITIES OF THE DIOCESE OF GALVESTON-HOUSTON, for placement in an adoptive home. CATHOLIC CHARITIES is licensed in accordance with the laws of the State of Texas and is authorized to place children for adoption. Petitioner is well aware of that authority. From the date of the child's birth until the initial trial concluded in December of 1977, the child remained in a duly licensed foster home. Subsequent to the conclusion of the trial the child was placed and still remains in a prospective adoptive home.

Respondents contend that the State has an interest in protecting children conceived and born out of wedlock,[17] and would rely on the rationale expressed by the Texas Supreme Court in this case.[18]

Should the Court strike down Section 13.21(b)(3) and (c) as Petitioner suggests the categories of unwed

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17. See *T.E.T.*, 603 S.W.2d at page 797.

18. *Id.* . . .
"The State has a valid objective in requiring the biological father to establish his "status" as a parent. Otherwise, we would recognize a sperm donor, a rapist, a hit and run lover, an adulterer and the like in the same legal status as a father who had accepted the legal and moral commitment to his family".

father listed in the lower Court decision[19] would then become a "parent"[20] and would unduly and unjustly hinder the State's compelling interest in facilitating the adoption placement of illegitimate children.[21] Such action would also remove any "best interest" standard which would undoubtedly work against an illegitimate child.

CONCLUSION AND PRAYER

In conclusion, Respondents would submit that Section 13.21, Tex. Fam. Code Ann. is not constitutionally infirm and further that this Court should not accept jurisdiction of this case for the reason that the question alleged by Petitioner here was not properly presented below.

Respondents respectfully submit that the Petition For Certiorari be denied and that Petitioner be ordered to pay all costs.

Respectfully submitted,

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19. *Id.*, (sperm donor, rapist, etc.).

20. See Section 11.01 & 12.02, Tex. Fam. Code Ann.

21. Caban, 60 L.Ed.2d page 314-315 (dissent, Mr. Justice Stevens).

APPENDIX

Section 11.01. *Definitions*

As used in this subtitle and Subtitle C of this title,[1] unless the context requires a different definition:

(1) "Child" or "minor" means a person under 18 years of age who is not and has not been married or who has not had his disabilities of minority removed for general purposes. "Adult" means any other person.

(2) "Court" means the district court, court of domestic relations, juvenile court having the jurisdiction of a district court, or other court expressly given jurisdiction of a suit under this subtitle.

(3) "Parent" means the mother, a man as to whom the child is legitimate, or an adoptive mother or father, but does not include a parent as to whom the parent-child relationship has been terminated.

(4) "Parent-child relationship" means the rights, privileges, duties, and powers existing between a parent and child as provided by Section 12.04 of this code.

(5) "Suit affecting the parent-child relationship" means a suit brought under this subtitle in which the appointment of a managing conservator or a possessory conservator, access to or support of a child, or establishment or termination of the parent-child relationship is sought.

(6) "Managing conservatorship" means the relationship between a child and a managing con-

1. Section 31.01 et seq.

servator appointed by court order or designated in an affidavit of relinquishment under this subtitle.

(7) "Authorized agency" means a public social agency authorized to care for children or to place children for adoption, or a private association, corporation, or person approved for that purpose by the State Department of Public Welfare through a license, certification, or other means.

(8) "Illegitimate child" means a child who is not and has never been the legitimate child of a man and whose parent-child relationship with its natural mother has not been terminated by a court decree.

(9) "Governmental entity" means the state, a political subdivision of the state, or an agency of the state.

Amended by Acts 1975, 64th Leg., p. 1253, ch. 476, §§ 1, 2, eff. Sept. 1, 1975; Acts 1979, 66th Leg., p. 1471, ch. 643, § 1, eff. Sept. 1, 1979.

Section 12.01. *Relation of Child to Mother*

A child is the legitimate child of his mother.

§ 12.02. *Relation of Child to Father*

(a) A child is the legitimate child of his father if the child is born or conceived before or during the marriage of his father and mother.

(b) A child is the legitimate child of his father if at any time his mother and father have attempted to marry in apparent compliance with the laws of this state or another state or nation, although the attempted marriage

is or might be declared void, and the child is born or conceived before or during the attempted marriage.

(c) A child is the legitimate child of a man if the man's paternity is established under the provisions of Chapter 13 of this code.[1]

Amended by Acts 1975, 64th Leg., p. 1260, ch. 476, § 22, eff. Sept. 1, 1975.

§ 12.04. *Rights, Privileges, Duties, and Powers of Parent*

Except as otherwise provided by judicial order or by an affidavit of relinquishment of parental rights executed under Section 15.03 of this code, the parent of a child has the following rights, privileges, duties, and powers:

(1) the right to have physical possession of the child and to establish its legal domicile;

(2) the duty of care, control, protection, moral and religious training, and reasonable discipline of the child;

(3) the duty to support the child, including providing the child with clothing, food, shelter, medical care, and education;

(4) the duty to manage the estate of the child, except when a guardian of the estate has been appointed;

(5) the right to the services and earnings of the child;

(6) the power to consent to marriage, to enlistment in the armed forces of the United States, and to medical, psychiatric, and surgical treatment;

1. Section 13.01 et seq.

(7) the power to represent the child in legal action and to make other decisions of substantial legal significance concerning the child;

(8) the power to receive and give receipt for payments for the support of the child and to hold or disburse any funds for the benefit of the child;

(9) the right to inherit from and through the child; and

(10) any other right, privilege, duty, or power existing between a parent and child by virtue of law.

Amended by Acts 1975, 64th Leg., p. 1260, ch. 476, § 23, eff. Sept. 1, 1975.

SUBCHAPTER A. PATERNITY SUIT

Section 13.01. *Time Limitation of Suit*

A suit to establish the parent-child relationship between a child who is not the legitimate child of a man and the child's natural father by proof of paternity must be brought before the child is one year old, or the suit is barred.

Added by Acts 1975, 64th Leg., p. 1261, ch. 476, § 24, eff. Sept. 1, 1975.

§ 13.08. *Decree*

(a) On a verdict of the jury, or on a finding of the court if there is no jury, that the alleged father is the father of the child, the court shall issue an order designating the alleged father as the father of the child.

(b) On a verdict of the jury, or on a finding of the court if there is no jury, that the alleged father is not

the father of the child, the court shall issue an order declaring this finding.

Added by Acts 1975, 64th Leg., p. 1261, ch. 476, § 24, eff. Sept. 1, 1975.

SUBCHAPTER B. VOLUNTARY LEGITIMATION

§ 13.21. *Voluntary Legitimation*

(a) If a statement of paternity has been executed by the father of an illegitimate child, the father or mother of the child or the State Department of Public Welfare may file a petition for a decree designating the father as a parent of the child. The statement of paternity must be attached to the petition.

(b) The court shall enter a decree designating the child as the legitimate child of its father and the father as a parent of the child if the court finds that:

(1) the parent-child relationship between the child and its original mother has not been terminated by a decree of a court;

(2) the statement of paternity was executed as provided in this chapter, and the facts stated therein are true; and

(3) the mother or the managing conservator, if any, has consented to the decree.

(c) The requirement of consent of the mother is satisfied if she is the petitioner. If the entry of the decree is in the best interets of the child, the court may consent to the legitimation of the child in lieu of the consent of the mother or managing conservator.

(d) A suit for voluntary legitimation may be joined with a suit for termination under Chapter 15 of this code.[1]

(e) A suit under this section may be instituted at any time.

Amended by Acts 1975, 64th Leg., p. 1261, ch. 476, § 24, eff. Sept. 1, 1975.

§ 13.22. *Statement of Paternity*

The statement of paternity authorized to be used in Section 13.21 of this code must be executed by the father of the child as an affidavit and witnessed by two credible adults. The affidavit must clearly state that the father acknowledges the child as his child, that he and the mother, who is named in the affidavit, were not married to each other at the time of conception of the child or at any subsequent time, and that the child is not the legitimate child of another man. The statement must be executed before a person authorized to administer oaths under the laws of this state.

Amended by Acts 1975, 64th Leg., p. 1261, ch. 476, § 24, eff. Sept. 1, 1975.

§ 111. *Whose consent required*

1. Subject to the limitations hereinafter set forth consent to adoption shall be required as follows:

(a) Of the adoptive child, if over fourteen years of age, unless the judge or surrogate in his discretion dispenses with such consent;

(b) Of the parents or surviving parent, whether adult or infant, of a child born in wedlock;

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1. Section 15.01 et seq.

(c) Of the mother, whether adult or infant, of a child born out of wedlock;

(d) Of any person or authorized agency having lawful custody of the adoptive child.

2. The consent shall not be required of a parent or of any other person having custody of the child:

(a) who evinces an intent to forego his or her parental or custodial rights and obligations as manifested by his or her failure for a period of six months to visit the child and communicate with the child or person having legal custody of the child, although able to do so; or

(b) who has surrendered the child to an authorized agency under the provisions of section three hundred eighty-four of the social services law; or

(c) for whose child a guardian has been appointed under the provisions of section three hundred eighty-four-b of the social services law; or

(d) who has been deprived of civil rights pursuant to the civil rights law and whose civil rights have not been restored; or

(e) who, by reason of mental illness or metal retardation, as defined in subdivision six of section three hundred eighty-four-b of the social services law, is presently and for the foreseeable future unable to provide proper care for the child. The determination as to whether a parent is mentally ill or mentally retarded shall be made in accordance with the criteria and procedures set forth in subdivision six of section three hundred eighty-four-b of the social services law.

3. Notice of the proposed adoption shall be given in such manner as the judge or surrogate may direct and an

opportunity to be heard thereon may be afforded to a parent who has been deprived of civil rights and to any other parent whose consent to adoption may not be required pursuant to subdivision two, if the judge or surrogate so orders. Notwithstanding any other provision of law, neither the notice of a proposed adoption nor any process in such proceeding shall be required to contain the name of the person or persons seeking to adopt the child.

4. Where the adoptive child is over the age of eighteen years the consents specified in paragraphs (b) and (c) of subdivision one of this section shall not be required, and the judge or surrogate in his discretion may direct that the consent specified in paragraph (d) of subdivision one of this section shall not be required if in his opinion the best interests of the adoptive child will be promoted by the adoption and such consent cannot for any reason be obtained.

5. An adoptive child who has once been lawfully adopted may be readopted directly from such child's adoptive parents in the same manner as from its natural parents. In such case the consent of such natural parents shall not be required but the judge or surrogate in his discretion may require that notice be given to the natural parents in such manner as he may prescribe.

6. For the purposes of paragraph (a) of subdivision two:

(a) In the absence of evidence to the contrary, the ability to visit and communicate with a child or person having custody of the child shall be presumed.

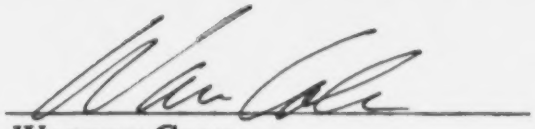
(b) Evidence of insubstantial or infrequent visits or communication by the parent or other person having custody of the child shall not, of itself, be sufficient as a matter of law to preclude a finding that the consent of such parent or person to the child's adoption shall not be required.

(c) The subjective intent of the parent or other person having custody of the child, whether expressed or otherwise, unsupported by evidence of acts specified in paragraph (a) of subdivision two manifesting such intent, shall not preclude a determination that the consent of such parent or other person to the child's adoption shall not be required.

(d) Payment by a parent toward the support of the child of a fair and reasonable sum, according to the parent's means, shall be deemed a substantial communication by such parent with the child or person having legal custody of the child.

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of Respondents' Brief In Opposition On Petition For Writ Of Certiorari to the United States Supreme Court has been mailed to JOHN V. ELICK, Attorney for Petitioner, P. O. Box 803, Two East Main, Bellville, Texas 77418, postage prepaid, return receipt requested on the 16th day of February, 1981.



WARREN COLE